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IN THE

Supreme Court of the United States

October Term, 1961.

No. 209

E. STANLEY RICHARDSON, ROMMEL WILSON and GEORGE M. CLARKE, Executors of the Estate of Gertrude Rommel Wilson, Deceased,

Petitioners,

v.

FRANCIS R. SMITH, individually and as former Collector of Internal Revenue for the First District of Pennsylvania,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

	Pages
I. Opinions of the Courts Below	2
II. Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked	2
III. Questions Presented for Review	3
IV. The Statutes Involved in the Case	4
V. Statement of the Case	5
VI. Reasons Relied Upon for Granting the Writ	8
VII. Argument	9
VIII. Appendix A:	
Opinion of Court of Appeals	21
Order Sur Petition for Rehearing	24

TABLE OF CASES AND AUTHORITIES

Cases:

	Page
Atlantic Mutual Insurance Company v. McMahon, 153 Fed. Supp. 48 (S. D. N. Y. 1957)	15
Arheit v. Commissioner, 31 T. C. 46 (1959)	13
Bank of New York v. United States, 170 Fed. (2d) 20 (3rd Cir. 1948)	14
Botany Worsted Mills v. United States, 278 U. S. 282 (1928)	14
Budd Co. v. United States, 252 Fed. 2d 456 (3rd Cir. 1957)	13
Busser v. United States, 130 Fed. 2d 537 (3rd Cir. 1942)	13
Hill v. United States 263 Fed. 2d 885 (3rd Cir. 1959)	15
Joyce v. Gentsch, 141 Fed. 2d 891 (6th Cir. 1944)	14
Mitchell v. Westover, 90 Fed. Supp. 278 (S. D. Cal. C. D. 1950)	13
Moore Ice Cream Co. v. Rose, 289 U. S. 373 (1932)	15
Murphy v. United States, 78 Fed. Supp. 236 (S. D. Cal. C. D. 1948)	13
Payson v. Commissioner, 166 Fed. 2d 1008 (2d Cir. 1948)	14
Phillip Jones Corp. v. Johnson, 155 Fed. Supp. 378 (D. C. Ala. S. D. 1957)	13
Ritter v. United States, 28 Fed. 2d 265 (3rd Cir. 1928)	17
Rose v. United States, 265 Fed. 2d 223 (3rd Cir. 1958)	13
Rosenman v. United States, 323 U. S. 658 (1945)	8, 9, 11, 12, 13, 16, 19
Stockstrom v. Commissioner, 190 Fed. 2d 283 (D. C. Cir. 1951)	17
Thomas v. Mercantile Bank at Dallas, 204 Fed. 2d 943 (5th Cir. 1953)	8, 9, 13, 14, 16
United States v. Dubuque Packing Co., 233 Fed. 2d 453 (8th Cir. 1956)	13, 14
United States v. Radio Corp. of America, 358 U. S. 334 (1959)	18
United States v. San Francisco, 310 U. S. 16 (1939)	17
United States v. Stewart, 310 U. S. 60 (1940)	18
Vestal v. Commissioner, 152 Fed. 2d 132 (D. C. Cir. 1945)	17
Walker v. United States, 189 Fed. 409, aff'd. 148 Fed. 1022 (5th Cir. 1906)	17

TABLE OF CASES AND AUTHORITIES (Continued).

Statutes:

	Page
Act of June 25, 1948, C. 644, 62 Stat. 928, 28 USC Section 1254(a)	2
Act of June 25, 1948, C. 646, 62 Stat. 949, 28 USC Section 1291	5
Internal Revenue Code of 1939, 26 USCA 1955 ed. I. R. C. of 1939 as Amended:	
Section 823, 53 Stat. 127	4, 16, 19
Section 910, 53 Stat. 138	4, 6, 10

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1961.

No.

E. STANLEY RICHARDSON, ROMMEL WILSON AND GEORGE M. CLARKE, EXECUTORS OF THE ESTATE OF GERTRUDE ROMMEL WILSON, DECEASED,

Petitioners,

v.

FRANCIS R. SMITH, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully pray this Court for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, to review the final judgment of that Court entered on March 28, 1962, affirming per curiam, the judgment of the District Court of the United States for the Eastern District of Pennsylvania entered on July 28, 1961.

A certified transcript of the record in this case, including the proceeding in said Court of Appeals, together with the requisite additional copies thereof, is furnished herewith in conformity with Rule 21 of this Court.

I.

OPINIONS OF THE COURTS BELOW.

The Opinion of the District Court for the Eastern District of Pennsylvania (R. 13a) is reported at 61-2, USTC, Section 12,035. The Opinion of the United States Court of Appeals for the Third Circuit is not yet reported in the Federal Reporter but may be found in Appendix A of this Petition.

II.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

A. The Court of Appeals for the Third Circuit entered its judgment on March 28, 1962, affirming the judgment of the United States District Court for the Eastern District of Pennsylvania.

B. The Court of Appeals for the Third Circuit entered its order denying Petition for Rehearing on May 4, 1962. No order has been entered respecting an extension of time within which to petition for certiorari.

C. This Court has jurisdiction of this case under Section (1) of the Act of June 25, 1948, Chapter 644; 62 Stat. 928; 28 USC Section 1254(1).

III.

QUESTIONS PRESENTED FOR REVIEW.

1. What is the date of "payment" of estate taxes for the purpose of the statute of limitations where taxpayers' check is received by the Collector prior to assessment of the tax and credited to his Suspense Account until after assessment; the check having been sent by taxpayers after executing "Waiver of Restrictions Against Immediate Assessment and Collection of Deficiency in Estate Tax", and after receiving a request for remittance, but without any concession or agreement that the proposed deficiency was correct or that they had any liability?

2. May the United States be heard to assert that payment of taxes was made prior to the date stamped upon the Collector's official receipt to a taxpayer, where the taxpayer relied upon the date so stamped in filing a claim for refund which claim was timely filed if the date upon which the Collector acknowledged having received payment is conclusive?

IV.

THE STATUTES INVOLVED IN THE CASE.

The following sections of the Internal Revenue Code of 1939, 26 USCA 1955 ed. I. R. C. of 1939 as Amended, are involved in this case:

Sec. 910. Period of Limitation for Filing Claims.

All claims for the refunding of the tax imposed by this subchapter alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years after the payment of such tax. The amount of the refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of the refund. (53 Stat. 138.)

Section 823. Duplicate Receipts.

The Collector shall grant to the person paying the tax duplicate receipts, either of which shall be sufficient evidence of such payment, and shall entitle the executor to be credited and allowed the amount thereof by any court having jurisdiction to audit or settle his accounts. (53 Stat. 127.)

V.

STATEMENT OF THE CASE.

This is an action for the recovery of Federal Estate taxes, arising out of petitioners' claims to credits against the taxes assessed, being almost exclusively credits incurred or matured after the filing of the Return. Pursuant to Court Order, however, the trial in the District Court was limited to whether the claim for refund was filed by petitioners within three years from the date of the payment of the alleged deficiency and interest thereon. The judgment of the District Court was entered July 28, 1961 (R. 16a) in favor of respondent and against petitioners. This Judgment was affirmed by the United States Court of Appeals for the Third Circuit on March 28, 1962, in a per curiam opinion which is printed as Appendix A to this Petition. Jurisdiction of the Court below is conferred by 28 USC Section 1291.

On May 1, 1943, the taxpayer-petitioners filed a Federal Estate Tax Return for the Estate of their decedent (R. 3a). The return showed a Federal Estate Tax due in the amount of $4,062.93, which amount was paid to the Collector at the time the return was filed (R. 3a, 13a). No claim was made for a refund of this part of the tax (R. 13a).

In the early part of 1946, the Estate Tax Return was examined by an agent of the Commissioner who recommended a proposed gross deficiency of $20,229.54, subject to a credit of $1,121.70 to become vested upon presentation of evidence of payment of State Inheritance Taxes (R. 4a, 19a). On February 25, 1946, petitioners signed a Waiver of Restrictions Against Immediate Assessment and Collection (R. 4a, 19a). Under date of March 25, 1946, respondent sent and petitioners received a form letter requesting payment of the net deficiency (after credit for State Inheritance Taxes) with interest, in the amount of $3,333.14, computed to March 28, 1946 (R. 4a, 20a).

Petitioners drew a check dated March 28, 1946 in the amount of the net deficiency proposed with interest, being $22,440.98, and mailed it to respondent (R. 4a, 21a). Respondent actually received this check on April 1, 1946, although his official receipt therefor mailed to petitioners on April 10, 1946, was stamped in red ink (R. 10a):

> "Rec'd with Remittance
> April 10, 1946
> Coll. Int. Rev.
> 1st Dist. Pa.
> Gimbel Bldg. Phila." (4a, 17a)

The amounts of the deficiency and interest, as reflected by petitioners' check, were placed by respondent in account 9, the Suspense Account (R. 4a, 21a). The proposed deficiency and interest were listed and assessed on the April 1946 Supplemental No. 1 Assessment List, page 190, line 0 prepared by the Commissioner and signed by him on April 30, 1946 (R. 5a-6a, 6b-10b, 22a-29a). Thereafter, on May 8, 1946, the remittance made by petitioners was transferred from the Suspense Account and credited against the assessment (R. 9b-10b, 29a).

On April 8, 1949, petitioners filed with respondent a Claim for Refund of taxes paid in the amount of $19,107.84, or such other amount as might be found to be legally refundable, and for interest paid on the alleged deficiency in the amount of $3,333.14, together with interest on both accounts as provided by law (R. 6a, 32a). In filing the claim for refund on that date, petitioners relied upon the official receipt issued to them by the Collector acknowledging receipt of their remittance on April 10, 1946, having concluded therefore, that they had until April 10, 1949 within which to file their claim (R. 10a). Respondent, however, refused to consider the claim on the ground that it was not filed within three years of payment of the tax under Section 910 of the Internal Revenue Code of 1939 (R. 7a, 18a) and suit followed.

The issue tried in the District Court was limited by court order to a determination of the date of payment of the deficiency and interest of $22,440.98 which started the running of the three-year statutory period of limitations (R. 7a). The judgment of the District Court against petitioners and in favor of respondent (R. 16a) was based upon the Court's conclusion of law that a remittance made by a taxpayer pursuant to notice of a proposed but not yet assessed deficiency, constitutes payment of the tax for the purpose of the statute of limitations, unless there is some accompanying statement clearly indicating a contrary intent (R. 15a).

The Court of Appeals affirmed the District Court's judgment on March 28, 1962, in a per curiam opinion (Appendix A hereto). In doing so, it agreed with the District Court that for purposes of the running of the statute of limitations "payment" was made when petitioners' check was received by the Collector. The Court of Appeals also rejected petitioners' argument that the Collector should not now be permitted to assert that payment was made prior to April 10, 1946, the date stamped upon the official receipt as the date of receipt of petitioners' remittance.

VI.

REASONS RELIED UPON FOR GRANTING THE WRIT.

The discretionary power of this Court to grant a Writ of Certiorari is invoked upon the following grounds:

1. The decision of the Court of Appeals for the Third Circuit with respect to the time of payment of the tax herein, is in direct conflict with the decision of the Court of Appeals for the Fifth Circuit in *Thomas v. Mercantile Bank at Dallas*, 204 Fed. 2d 943 (5th Cir., 1953), and is probably in conflict with the decisions of other Federal Courts.

2. The decision of the Court of Appeals for the Third Circuit with respect to the time of payment of the tax herein, is in conflict with the decision of this Court in *Rosenman v. United States*, 323 U. S. 658 (1945).

3. Whether the United States is bound by the date of the Collector's official tax receipt for the purpose of the statute of limitations on claims for refund, is an important Federal question which has not been, but should be settled by this Court.

VII.

ARGUMENT.

This Petition commends to the Court's attention two distinct questions (Questions Presented for Review, *infra* p. 5) and the reasons relied upon by petitioners for allowance of the Writ are different as to each question. Accordingly, this argument amplifying those reasons will treat each question in a separate point.

The first point is governed by the decisions of this and other Federal Courts. There is no dispute on the facts. A remittance was made prior to assessment of the tax and the funds were credited by the Collector to his Suspense Account. The claim for refund was made within three years of the assessment but not within three years of receipt of the remittance by the Collector. Petitioners argue that under the decision of this Court in *Rosenman v. United States*, 323 U. S. 658 (1945) "payment" of the tax was not made until the tax was assessed. The District Court and the Court of Appeals, however, have held that "payment" was made upon receipt of Petitioners' check. This is in direct conflict with the decision of the Court of Appeals for the Fifth Circuit in *Thomas v. Mercantile Bank at Dallas*, 204 Fed. 2d 943 (5th Cir. 1953) which is identical on its facts with the case at bar. The decisions of the courts below appear to be based upon the fact that petitioners did not accompany their remittance with a letter of protest stating that the remittance was being made only to stop the running of penalties and interest. Both Courts found as a fact, however, that petitioners did not concede or agree to any liability. In this regard petitioners argue that whether a remittance is made under protest or without protest, is irrelevant to the determination of when such remittance constitutes "payment". In the one case, the remittance results in a "payment" made under protest, in the other, it results in a "payment" to which no protest

has as yet been lodged; but in both cases the taxpayer is entitled to claim for refund within three years from the date on which payment was made.

Petitioners' second point, though of grave significance, does not appear to have been previously decided by the Federal Courts. The principle asserted is that the United States having authorized the Collector by statute to issue a binding receipt for taxes paid, should not be permitted to repudiate his act and is bound by the declarations on the receipt. Here such a receipt was issued and relied upon by petitioners in calculating the time within which they might file their claim for refund. The Court of Appeals refused to bind the United States to the receipt, basing its conclusion upon the fact that the numbers "4-1-46" appear on the document upon which the receipt stamp was placed. Although the stamp itself clearly acknowledged payment as having been made on April 10, 1946, the Court of Appeals found that the "4-1-46" was notice to petitioners that their payment was received on April 1, 1946, even though a direct contradiction of the official stamp. An examination of this receipt by the Court will show that the existence of these figures was in no way notice to petitioners which should have put them on their guard or raised a duty of inquiry. Petitioners are entitled by law to rely on the Collector's receipt; they have so relied in this case; and the United States is bound thereby.

First Point of Argument.

The issue for determination in this case was whether petitioners' claim for refund was timely filed under Section 910 of the Internal Revenue Code of 1939, 53 Stat. 138, 26 USCA 1955 ed. I. R. C. of 1939 as Amended, Section 910, which reads as follows:

> "All claims for the refunding of the tax imposed by this subchapter alleged to have been erroneously or illegally assessed or collected must be presented to the

Commissioner within three years after the payment of such tax. The amount of the refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of the refund."

The facts were not in dispute as to the events leading up to the institution of this action and the problem resolved itself very simply to: what is the date of "payment of such tax" which started the running of the three-year limitations period.

Your petitioners contended that the "payment of such tax" did not occur until their remittance was credited against the assessment on May 8, 1946, or at least until the assessment was made by the Commissioner on April 30, 1946. Since their claim for refund was filed on April 8, 1949, it was well within the time allowed. The Collector contended, however, that the operative time of "payment" was his receipt of the check on April 1, 1946 and thus that the claim for refund was not timely filed.

In *Rosenman v. United States*, 323 U. S. 658 (1945), this Court had before it a strikingly similar case. There the taxpayer-executors had received an extension of the time within which to file their estate return but no extension on payment of the tax. Accordingly, on December 24, 1934, the day before payment was due, they sent a check in the amount of $120,000 to the Collector. On February 25, 1935, they filed a return showing substantially less tax to be due and were notified on March 28, 1935 that the Collector had applied a portion of the $120,000 payment to the tax obligation shown on the return. On March 26, 1938, taxpayers filed a claim for refund of the balance. Nearly three years later a deficiency was assessed which exceeded the remaining balance of the $120,000 and on April 22, 1938, taxpayers paid the excess. On May 20, 1940, a claim for refund was filed based upon additional estate deduc-

tions. Except to the extent of the payment made in 1938, the claim was denied as not having been timely filed. There, as here, the Collector argued that "payment" was made upon his receipt of taxpayers' remittance but this Court held to the contrary saying (p. 661):

> "The claim is for refund of a tax alleged to have been erroneously or illegally assessed or collected, and the claim must have been filed 'after the payment of such tax', that is, within three years after payment of a tax which according to the claim, was erroneously or illegally collected. The crux of the matter is the alleged illegal assessment or collection, and 'payment of such tax' plainly presupposes challenged action by the taxing officials."
>
> " . . . The amount demanded as a deficiency by the Commissioner was, so the petitioners claimed, erroneously assessed. It is this erroneous assessment that gave rise to a claim for refund. Not until then was there such a claim as could start the time running for presenting the claim."

Applying this reasoning to the case at hand, we find that until the assessment of the tax on April 30, 1946, there was no "illegal assessment or collection" of which these taxpayers could complain. Certainly the remittance received by the Collector on April 1, 1946 can no more be categorized an "illegal collection" than could the remittance of the taxpayers in *Rosenman*. It was voluntarily made, though at the request of the Collector, and could not have been demanded or required until such time as the assessment of the deficiency had been made by the Commissioner.

Petitioners do recognize that under certain circumstances a Court might properly hold that collection of a tax had been made without assessment. Where a taxpayer files a return showing a tax to be due and accompanies his

return with a remittance in that amount, he quite obviously intends that his remittance be in discharge of his admitted liability. Thus, there is no need for the process of assessment since the taxpayer admits, in fact self-assesses, his liability. It may, under these circumstances, be said that the remittance constitutes "payment" of an admitted liability and that a tax admitted to be due has been "collected". Similarly, if a taxpayer were to concede liability for, and the correctness of, a deficiency and remit funds in discharge thereof, again it would be proper to say that there had been a "payment" and a "collection". In either case, the importance of the admission of liability and remission of funds in discharge thereof is that it serves as a waiver of the requirement of assessment.

This is in accord with the Federal cases. The uniformly held rule is that to constitute "payment" a remittance must be made against a tax which has been returned or assessed: *Boschman v. United States*, 323 U. S. 658 (1945); *Thomas v. Mercantile National Bank at Dallas*, 204 Fed. 2d 943 (5th Cir. 1953); *Basser v. United States*, 130 Fed. 2d 537 (3rd Cir. 1942); *Budd Co. v. United States*, 252 Fed. 2d 456 (3rd Cir. 1957); *Rose v. United States*, 256 Fed. 2d 223 (3rd Cir. 1958); *Murphy v. United States*, 78 Fed. Supp. 236 (S. D. Calif. C. D. 1948); *Mitchell v. Westover*, 90 Fed. Supp. 278 (S. D. Calif. C. D. 1950); *United States v. Dubuque Packing Co.*, 233 Fed. 2d 453 (8th Cir. 1956); *Arbeit v. Commissioner*, 31 T. C. 46 (1959); *Phillip Jones Corp. v. Johnson*, 155 Fed. Supp. 378 (S. D. Ala. S. D. 1957).

It cannot be said that petitioners, by signing the Waiver of Restrictions Against Immediate Assessment and Collection of Deficiency in Estate Tax, waived the requirement of assessment and consented to the "collection" of the proposed deficiency prior thereto. An examination of the Waiver (R. 19a) shows that it was clearly contemplated that assessment would be made. The "Note" at the bottom thereof states in part:

> "The execution and filing of this Waiver will expedite the settlement of the case and will reduce accumulation of interest, as the regular interest period terminates 30 days after the filing of the Waiver or on the date of assessment, whichever is earlier."

Furthermore, it cannot be said and the lower courts did not find, that petitioners conceded the correctness or agreed to the obligation of any tax indebtedness by executing the Waiver. The effect of the filing of a Waiver has been determined judicially in a number of cases. In *United States v. Dubuque Packing Co., supra*, the Court said:

> ". . . It (the Government) stresses particularly that the taxpayer 'agreed' to the deficiencies and that it waived the restrictions on assessment and collection of the deficiencies. But the 'agreement' relied on was not an agreement to the obligation of an indebtedness in the ordinary sense. The revenue agent proposed deficiencies and the taxpayer by its 'agreement' merely indicated its willingness that the taxing process go forward to assessment. The taxpayer's right to file claim for refund and bring suit was not lost by the agreement but was fully preserved to the taxpayer and the Commissioner on his part was not under obligation to assess the amount of the proposed deficiency by reason of the 'agreement'.

See also *Botany Worsted Mills v. United States*, 278 U. S. 282; *Thomas v. Mercantile National Bank at Dallas, supra*; *Joyce v. Gentsch*, (C. A.-6) 141 Fed. (2d) 891; *Payson v. Commissioner* (C. A.-2); 166 Fed. (2d) 1008); *Bank of New York v. United States* (C. A.-3), 170 Fed. (2d) 20.

The remittance of petitioners in this case can only be described as a voluntary deposit of funds with the Collector in anticipation of an expected assessment, to be applied against that assessment when made, thereby preventing the accumulation of further interest. And the record indicates

that it was so received and treated by the Collector. Although, through error, initially credited to petitioners' account, it was quickly removed, the entry voided, and it credited to the Collector's Suspense Account. Here it remained as a cash bond securing the payment of future tax obligations until the proposed deficiency was assessed on April 30, 1946. Then, on May 8, 1946, it was applied against the assessment.

The Court of Appeals and the District Court erroneously concluded that petitioners' remittance did constitute a payment, basing their decisions upon the fact that petitioners' remittance was not accompanied by any "statement clearly indicating a contrary intent" (R. 15a). Both courts, however, found as a fact that petitioners did not agree or concede that the claimed deficiency was correct (R. 14a; Appendix A hereto). What then, can be the legal effect of the protest which these courts would have had petitioners send to the Collector? A payment is certainly no less a payment merely because it is made under protest and a deposit of funds prior to assessment and without concession of liability is no less a deposit merely because it is not made under protest.

Once having found that petitioners did not concede any liability, the fact that they sent no protest with their remittance is meaningless since the only fact which the protest could establish is already determined. See *Moore Ice Cream Co. v. Rose*, 289 U. S. 373 (1932); *Atlantic Mutual Insurance Company v. McMahon*, 153 Fed. Supp. 48 (S. D. N. Y. 1957).

In *Hill v. United States*, 263 Fed. 2d 885 (3rd Cir. 1959), the case upon which the courts below based their decisions, it was held (and we think properly so) that the filing of a return with a check in the amount of the tax shown to be due, constituted "payment" within the meaning of the statute of limitations. But in that case, there was and could be no finding of fact that the taxpayers had not agreed to or conceded liability. They themselves determined the liability and brought it to the attention of

the Collector by filing the return. Therefore, in the context of that case, the lack of an "accompanying statement clearly indicating a contrary intent" is important. The filing of the return showing the tax due is a declaration of liability and any reasonable person would interpret the accompanying remittance as in discharge of that admitted liability—unless there were a clear statement or direction to the contrary. That, of course, is not the situation here, where petitioners have made no concession of liability. Accordingly, the lack of a protest accompanying their remittance cannot be given the effect placed upon it by the Court of Appeals, affirming, per curiam, the decision of the District Court.

It is submitted that the Court of Appeals for the Third Circuit has failed properly to interpret and apply the decision of this Court in *Rosenman, v. United States, supra*, resulting in a conflict between its decision in this case and the decision of the Court of Appeals for the Fifth Circuit in *Thomas v. Mercantile Bank at Dallas, supra*, as well as the decisions of the other circuits referred to herein. The existence of a conflict between circuits and the misinterpretation of a decision of this Court on a question of such widespread interest and importance as is here presented, are reasons justifying the invocation by this Court of its jurisdiction to review on Writ of Certiorari.

Second Point of Argument.

In filing their claim for refund on April 8, 1949, petitioners relied upon the official receipt of the Collector which acknowledged payment as having been received on April 10, 1946. This receipt was granted by the Collector pursuant to Section 823 of The Internal Revenue Code of 1939; 53 Stat. 127; 26 USCA, 1955 ed. I. R. C. of 1939 as Amended, Section 823 which states:

> "The Collector shall grant to the person paying the tax duplicate receipts, either of which shall be sufficient

> evidence of such payment and shall entitle the executor to be credited and allowed the amount thereof by any court having jurisdiction to audit or settle his accounts."

The words "either of which shall be sufficient evidence of such payment" are a clear, unambiguous statutory mandate that the United States is to be bound by such receipts, and that the courts must accept them as conclusive and irrebuttable proof of the payment. The purpose of this act quite obviously is to require the Collector to put something in the hand of the taxpayer upon which he may rely to prove his payment without fear of contradiction. And yet that contradiction is precisely what was permitted by the courts below.

In the proceedings below this issue was framed in the context of estoppel or waiver, as well it might be, since its result is to bind the United States by the act of its agent. Estoppel as it applies to the sovereign is an extremely limited concept. As stated in *Ritter v. United States*, 28 F. 2d 265 (3rd Cir. 1928):

> ". . . The acts or omissions of the officers of the Government, if they be authorized to bind the United States in a particular transaction, will work estoppel against the Government, if the officers have acted within the scope of their authority."

See also *Vestal v. Commissioner*, (C. A. D. C.) 152 Fed. (2d) 132; *Stockstrom v. Commissioner*, (C. A. D. C.) 190 Fed. (2d) 283; *Walker v. United States*, 139 Fed. 409, 413, aff'd (C. A. 5), 148 Fed. 1022.

Furthermore, this Court has on repeated occasions, indicated that an estoppel could be visited against the sovereign but only where the complained of acts of its agents were duly authorized by law. Thus, in *United States v. San Francisco*, 310 U. S. 16 (1939), this Court said (p. 32):

> "As to estoppel, it is enough to repeat that '. . . the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit.'"

Again, in *United States v. Stewart*, 310 U. S. 60 (1940), it was said (p. 70):

> "An officer or agency of the United States to whom no administrative authority has been delegated cannot estop the United States even by an affirmative undertaking to waive or surrender a public right."

See also *United States v. Radio Corp. of America*, 358 U. S. 334 (1959), wherein the Court again tacitly recognizes this position.

Admittedly the above-cited decisions of this Court were cases in which the doctrine was held not to be applicable under the facts but their fair import is that where the act complained of is one in which the agent was authorized *to act for and bind* the United States, the United States may not deny his act as its own, and is estopped thereby.

Nevertheless, the Court of Appeals denied petitioners the right to rely on the Collector's receipt and determined that payment was made at an earlier time, thus barring their claim for refund as not having been timely filed. In doing so, it found that the date "April 1, 1946" appeared on the receipt as the date of payment as well as the date April 10, 1946. An examination of the document referred to as the receipt (R. 17a) will show that this is not quite accurate. In the "amount paid" box on the "Notice and Demand for Estate Tax" to which the receipt stamp was affixed in red ink, the numbers "4-1-46" appear. There is no accompanying explanation of their meaning and there is no clarifying evidence in the record. Counsel for the Government merely stated in his brief, "The '4-1-46' clearly indicates the taxpayers were credited with having made payment on

April 1, 1946" (Appellee's Brief, p. 25) and the Court of Appeals adopted it. This was clearly erroneous and wholly unreasonable.

Once having had the benefit of counsel's explanation of these numbers, and having now been advised that the United States considered itself paid on April 1, 1946, these numbers do take on a significance. However, it must be remembered that Petitioners did not have the benefit of this information. They received a document conspicuously stamped in red ink "REC'D WITH REMITTANCE, APRIL 10, 1946." This document had many other things typed on it, but none purported to deal with acknowledgment of receipt of payment except the red stamp. This is, of course, quite similar to the familiar mercantile practice of the receipted invoice.

The decision of the Court of Appeals that this receipt indicated the tax was received or paid on April 1, 1946 is a distortion of the clear import of the document. No businessman, no taxpayer and no lawyer would so interpret it. This Court said in *Rosenman v. United States*, *supra* (p. 663):

> "The construction which in our view the statute compels safeguards the interests of the Government, interprets a business transaction according to its tenor, and avoids gratuitous resentment in the relations between Treasury and taxpayer."

We respectfully submit that Section 823 of the 1939 Code *supra*, compels the conclusion that taxpayers be permitted to rely on the fair import of official receipts issued pursuant thereto, without fear of contradiction by the United States. To hold otherwise would be to permit the United States to repudiate these releases whenever an advantage could be gained, resulting in not only resentment but the confusion and uncertainty which the Act was designed to eliminate.

Clearly, whether taxpayers may rely upon the receipts of their Government is a question of great national significance and it is submitted that a definitive ruling is required.

of this Court to forestall the uncertainty and confusion which will otherwise result.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari be issued under the seal of this Court, directed to the United States Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and all proceedings of said Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the said Circuit Court of Appeals be reversed; and that your Petitioners be granted such other and further relief as to this Honorable Court may seem just and proper.

Respectfully submitted,

E. STANLEY RICHARDSON, JR., ROMMEL WILSON, GEORGE M. CLARKE, EXECUTORS OF THE ESTATE OF GERTRUDE ROMMEL WILSON, DECEASED,
Petitioners.

By: FRED C. ALDRIDGE, JR.,
LEWIS M. STEVENS,
DANIEL MUNGALL, JR.,
Counsel for Petitioners.

Of Counsel:
STRADLEY, RONON, STEVENS & YOUNG.

Dated: June 25, 1962.

VIII. APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,798

E. STANLEY RICHARDSON, ROMMEL WILSON AND GEORGE M. CLARKE, EXECUTORS OF THE ESTATE OF GERTRUDE ROMMEL WILSON, DECEASED,
Appellants

v.

FRANCIS R. SMITH, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued March 20, 1962

Before GOODRICH, MCLAUGHLIN and KALODNER, *Circuit Judges.*

OPINION OF THE COURT.

(Filed March 28, 1962)

PER CURIAM

This is an action for the recovery of federal estate taxes. The defense is the statute of limitations of the In-

ternal Revenue Code of 1939, which requires claims for refund to be presented to the Commissioner within three years after payment.[1] The taxpayers filed a federal estate tax return for their decedent and paid the amount they figured to be due. This return was examined by an agent of the Commissioner who claimed a deficiency. The defendant sent and the taxpayers received a form letter requesting payment of the deficiency, with interest computed to March 28, 1946. The taxpayers did not concede that the amount of the alleged deficiency was correct but on the same day drew a check for the claimed amount and mailed it without explanation to the Collector of Internal Revenue for the First District of Pennsylvania. The taxpayers' receipt for this payment bore the date of April 10, 1946, but on the same document the date April 1, 1946 appeared.

The taxpayers claim that the date of payment was April 10, the date stamped in large type on the receipt. The Collector contends that the date was April 1, which was the date the check was received by the Collector and which date is also shown upon the receipt. The district court relied upon the decision of this Court in *Hill v. United States*, 263 F.2d 885 (1959).

We think the district court was correct and that the *Hill* case governs. The set of facts here is almost like that in *Hill*. There the taxpayers sent their check with their estimated tax; here the taxpayers sent their check upon receipt of a Government request to pay. We can see no difference in principle between the two cases.

The taxpayers claim estoppel against the Government because they relied upon the April 10 date shown on the receipt. But it is to be kept in mind that that same receipt showed also, though not so conspicuously, the April 1 date. Under these circumstances we cannot see how a convincing argument for the application of an estoppel—even assuming that the Government would be bound by an estoppel—can be made.

1. Int. Rev. Code of 1939, § 910.

There is no appealing equity in the Government's position here. But we and other courts have pointed out in many instances that taxation is a game which must be played strictly in accordance with the rules.

The judgment of the district court will be affirmed.

ORDER SUR PETITION FOR REHEARING.

Present: GOODRICH, MCLAUGHLIN, KALODNER and GANEY, *Circuit Judges.*

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By THE COURT,

GOODRICH,
Circuit Judge.

Dated: May 4, 1962.

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FILED
JUL 25 1962
JOHN F. DAVIS, CLERK

No. 209

In the Supreme Court of the United States

OCTOBER TERM, 1962

E. STANLEY RICHARDSON, ET AL., EXECUTORS OF THE ESTATE OF GERTRUDE ROMMEL WILSON, PETITIONERS

v.

FRANCIS R. SMITH, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and Regulations involved	2
Statement	3
Argument	7
Conclusion	13

CITATIONS

Cases:	
Goldstein v. *United States*, 227 F. 2d 1	12
Hill v. *United States*, 263 F. 2d 885	6, 9
Hull v. *Commissioner*, 87 F. 2d 260	12
Lewyt Corp. v. *Commissioner*, 215 F. 2d 518, affirmed in part and reversed in part, 349 U.S. 237	9
Rosenman v. *United States*, 323 U.S. 658	8, 9, 10, 11
Thomas v. *Mercantile Nat. Bank of Dallas*, 204 F. 2d 943	9, 10, 11
Walker-Hill Co. v. *United States*, 162 F. 2d 259, certiorari denied, 332 U.S. 771	12
Wilber Nat. Bank v. *United States*, 294 U.S. 120	12
Statutes:	
Internal Revenue Code of 1939:	
Sec. 871(a) (26 U.S.C. 1952 ed., Sec. 871(a))	4
Sec. 874(a) (26 U.S.C. 1952 ed., Sec. 874(a))	6
Sec. 910 (26 U.S.C. 1952 ed., Sec. 910)	2, 7
Miscellaneous:	
Treasury Regulations 105, Sec. 81.77	3, 12

648642 62

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 13a–15a)[1] is reported at 196 F. Supp. 432. The *per curiam* opinion of the court of appeals (Pet. 21–23) is reported at 301 F. 2d 305.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1962 (Pet. 21). A petition for rehearing was denied on May 4, 1962 (Pet. 24). The peti-

[1] "R.—" references are to the appendix to taxpayers' brief in the court of appeals. "Supp. R. —" references are to the government's brief in the court of appeals.

tion for a writ of certiorari was filed on June 25, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Collector sent and taxpayers received a letter requesting payment of an estate tax deficiency of $19,107.84 plus interest of $3,333.14. On the day they received the letter, taxpayers drew a check in the exact amount requested and mailed it without protest or explanation to the Collector who received the remittance on April 1, 1946. Thereafter, on April 30, 1946, the Commissioner signed an assessment of the tax. On April 8, 1949, taxpayers filed a claim for refund of the amount paid. Section 910 of the Internal Revenue Code requires that a claim for refund of a tax "alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of such tax." The questions presented are:

1. Whether the courts below properly held that "payment" of the tax occurred on April 1, 1946, the day the remittance was received by the Collector.

2. Whether a receipt for this payment which was mailed to the taxpayers and which showed both the dates April 1, 1946, and April 10, 1946, estops the United States from asserting that April 1, 1946, was the date of payment.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1939 (26 U.S.C. 1952 ed., Sec. 910):

> SEC. 910. PERIOD OF LIMITATION FOR FILING CLAIMS.

> All claims for the refunding of the tax imposed by this subchapter alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of such tax. The amount of the refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of the refund.

Treasury Regulations 105 (1939 Code):

> SEC. 81.77 *Payment by check.*—Collectors may accept uncertified checks in payment of the tax, provided such checks are collectible at par, that is, for the full amount, without any deduction for exchange or other charges. The collector will stamp upon the face of each check before deposit thereof the words "This check is in payment of an obligation to the United States and must be paid at par. No protest." This should be followed by his name and title. The day on which the check is received will be considered the date of payment so far as the taxpayer is concerned, unless the check is returned dishonored. * * *

* * * * *

STATEMENT

On May 1, 1943, the taxpayers, executors of the estate of Gertrude Rommel Wilson, filed a federal estate tax return for the estate of their decedent (R. 3a, 13a). The return showed a federal estate tax due in the amount of $4,062.93, which amount was paid to the Collector at the time the return was filed (R. 3a, 13a).

In the early part of 1946, the estate tax return was examined by an agent of the Commissioner (R. 4a). The agent's report proposed a net deficiency against the estate of $19,107.84 (R. 4a). On February 25, 1946, the taxpayers signed an official waiver[2] which authorized immediate assessment and collection of the deficiency in the sum of $19,107.84, plus interest, and provided that the running of interest on the deficiency would terminate 30 days after the filing of the waiver or on the date of assessment, whichever is earlier (R. 4a, 19a). On March 25, 1946, the Collector mailed a form letter to the taxpayers requesting payment in the amount of the net deficiency recorded in the waiver ($19,107.84), plus interest ($3,333.14) computed to March 28, 1946 (R. 4a, 13a, 19a). The Collector's letter stated (R. 20a) (emphasis added):

> This office has received from the Internal Revenue Agent in Charge, together with the related documents, your agreement consenting to the immediate assessment of an estate tax deficiency, with respect to the above-named estate, amounting to $19,107.84.
>
> Interest has accrued on this deficiency at 6 percent per annum from fifteen months from the date of death to thirty days from receipt of the waiver.
>
> The interest has been figured in this case to March 28, 1946 and amounts to $3,333.14.

---

[2] Absent a waiver, Section 871(a) of the 1939 Code (26 U.S.C. 1952 ed., 871(a)), barred the Commissioner from assessing a deficiency or bringing proceedings for its collection until 90 days after the mailing of a formal notice of deficiency to the taxpayer.

It is requested that you return the enclosed copy of this letter with your remittance, covering both the tax and interest. No further interest is due.

Upon receipt of this letter the taxpayers drew a check dated March 28, 1946, for the exact amount requested ($22,440.98), and mailed it, without explanation and without any indication that they did or did not agree with the claimed deficiency, to the Collector (Pet. 22; R. 14a). The district court found that at the time the size of the estate and the amount of the tax depended on the outcome of claims of creditors and the size of an interest in another decedent's estate and that the executors consequently did not agree that the claimed deficiency was correct (R. 13a–14a).

The Collector received the check on April 1, 1946 (R. 4a, 14a). Subsequently, by transmittal letter dated April 10, 1946, the Collector sent the taxpayers a duplicate receipt acknowledging "payment" (R. 4a, 14a, 17a). Under "AMOUNT PAID" the receipt showed "$22,440.98" plus the date "4–1–46" (R. 17a). It also carried the following, which had been stamped below the words "COLLECTOR'S PAID STAMP" (R. 17a):

> Re'd with Remittance
> April 10, 1946
> Coll. Int. Rev.
> 1st Dist. Pa.
> Gimbel Bldg. Phila.

The $22,440.98 remittance was credited to a tax account set up for the estate (R. 24a). Thereafter, on April 30, 1946, the Commissioner signed an assessment

for the dollar amount of the deficiency and interest (R. 5a, 6a). Contemporaneously with the signing, the deficiency and interest were removed from the estate account and credited to a suspense account. Eight days later, on May 8, 1946, they were returned to the estate account (R. 5a–6a, 24a, 25a, 29a, 31a; Supp. R. 5b–10b).[1]

On April 8, 1949, taxpayers filed with the Internal Revenue Service a claim for refund of $22,440.98 plus interest (R. 6a–7a, 14a, 32a). By letter dated June 30, 1952, a representative of the Commissioner notified the taxpayers that no further consideration would be given to their claim for refund for the reason that it was not timely filed (R. 7a, 18a). On or about June 24, 1954, the taxpayers commenced the instant action for refund (R. 1a). In a separate trial of the statute-of-limitations issue (R. 1a), the district court, relying on *Hill* v. *United States*, 263 F. 2d 885 (C.A. 3), held that payment took place no later than April 1, 1946 (R. 13a–15a). The court stated (R. 15a):

> The principle of the *Hill* case would seem to be that if a taxpayer *without explanation* sends a check with an estate tax return, in an amount

[1] The temporary removal of the funds from the estate account was apparently necessitated by the need to take the case up ahead of the normal schedule in order to complete formal assessment by May 1, 1946, the last date for such action under the three-year limitations period set by Section 874(a) of the 1939 Code (26 U.S.C. 1952 ed., 874(a)) for such action by the government. (See R. 5a, 27a.) Had early action on the assessment not been necessary, it is apparent that the moneys would have remained from the date of their receipt in the estate account.

> corresponding to the tax indicated on the return, without some accompanying statement clearly indicating a contrary intent, that remittance constitutes payment of the tax indicated on the return. It would seem to follow from this that where a revenue official makes a written request for a specific amount of tax and interest and the taxpayer promptly sends a check for that exact amount, without some accompanying statement clearly indicating a contrary intent, that remittance constitutes payment of the tax and interest requested. The remittance so made in this case constitutes payment, and since the claim for refund was filed more than three years thereafter, it is barred by § 910.

The court of appeals affirmed *per curiam* (Pet. 21–22), finding (Pet. 22) "no difference in principle" between this case and *Hill*. The court also rejected petitioners' argument that the April 10 date shown on the receipt estopped the United States from claiming that the payment occurred on April 1.

ARGUMENT.

1. The decision below is correct. There is no conflict, and the case presents no question warranting further review.

Section 910 of the Internal Revenue Code of 1939, *supra*, pp. 2–3, provides that a claim for refund of an estate tax "alleged to have been erroneously or illegally assessed or collected must be presented to the

Commissioner within three years next after the payment of such tax" and the "amount of refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim * * *." Giving those words their ordinary meaning, *Rosenman* v. *United States*, 323 U.S. 658, 661, the Commissioner and the courts below were plainly warranted in finding that the payment occurred on April 1, 1946, when the taxpayers' check was received by the Collector. The tax obligation had been defined. Thus, the waiver which the taxpayers signed gave them official notice of the amount of the deficiency claimed and their liability for interest to March 28, 1946, or the date of assessment, whichever was earlier. Thereafter, petitioners received from the Collector a formal, written request for payment of the exact dollar amount of the deficiency plus interest computed to March 28, 1946. On the same day, they forwarded a check in that amount to the Collector from whom they had received the request. They made no protest and neither disclaimed liability nor disputed the amount due.[4]

---

[4] There was no reason for the Commissioner or the courts below to consider that the remittance was, as petitioners contend, "a voluntary deposit of funds with the Collector in anticipation of an expected assessment, to be applied against that assessment when made, thereby preventing the accumulation of further interest" (Pet. 14). There was no cause for such a voluntary deposit for the waiver stopped the accumulation of interest on March 28, 1946 (see Statement, *supra*).

Nor is there any basis in the record for the inferences which petitioners draw from the fact that the payment was held in a suspense account for eight days from April 30 to May 8, 1946.

The check had the legal effect of "payment" in that it satisfied and discharged the asserted tax liability and left the taxpayers with an immediate right to sue for refund. *Rosenman* v. *United States*, *supra*, at 662; *Lewyt Corp.* v. *Commissioner*, 215 F. 2d 548, 522-523, 527-528 (C.A. 2), affirmed in part and reversed in part, 349 U.S. 237; *Hill* v. *United States*, 263 F. 2d 885 (C.A. 3).

Taxpayers argue that the payment did not occur until the assessment was signed by the Commissioner on April 30, 1946 (Pet. 9, 12). In making this argument, they rely on *Rosenman* v. *United States*, *supra*, and *Thomas* v. *Mercantile Nat. Bank of Dallas*, 204 F. 2d 943 (C.A. 5), with which they claim the decision below is in conflict (Pet. 9). However, neither those cases nor the statute make an assessment a necessary pre-condition to "payment," either generally or in the situation presented here. Section 910 speaks of a claim for refund of a tax "alleged to have been erroneously or illegally assessed *or collected*" (emphasis added). "Congress has evidently meant what these words ordinarily convey" (*Rosenman* v.

Contrary to their assertion that the action shows that the Collector received and treated the payment as a voluntary deposit in anticipation of an expected assessment, the record indicates that the transfer to the suspense account was necessitated by the internal bookkeeping required to permit completion of the assessment prior to the expiration of the statute of limitations covering such actions by the government. The transfer was made at the request of the Commissioner (R. 27a) and had nothing to do with his judgment whether the remittance was a "deposit on account" rather than a "payment". See Statement, *supra*, p. 6, n. 3.

United States, *supra*, at 661) and they leave no doubt that an assessment is not required.

In fact, petitioners concede that a tax may be paid without assessment, as when a remittance accompanies a return or where a taxpayer expressly admits liability (Pet. 12–13). The argument here is that in the absence of a return or an express admission of liability, a payment cannot occur until assessment. However, neither *Rosenman* nor *Mercantile Nat. Bank* stands for such a limited rule. In both cases the courts found that the date of assessment began the three-year period although the taxpayers had paid over the sums which were the subject of the refund claims prior to assessment. Nonetheless, the holdings rest on the particular facts presented, which differ materially from those at issue here.

Here, the facts show that the government had plainly asserted the liability in a stated sum, had officially requested payment in that amount, had received a check in that sum from the taxpayers in immediate response to the request and had treated the check as a payment of the deficiency. In *Rosenman* there had been no definition of the tax obligation prior to the time of the remittance. Because the tax became due on December 25, 1934, while the time for filing the estate tax return had been extended to February 25, 1935, the taxpayers there delivered a check for $120,000 on December 24. In a letter of transmittal accompanying the check the taxpayers advised that it was a payment on account "made under protest and duress, and solely for the purpose of avoiding penal-

ties and interest * * *" (*Rosenman v. United States*, *supra*, at 660). The Court found that the taxpayer did not discharge what he deemed a liability nor pay one that was asserted (*id.* at 662), and held that a subsequent "erroneous assessment" some three years later gave rise to the claim for refund.

In *Thomas v. Mercantile Nat. Bank*, *supra*, the taxpayers forwarded a check prior to assessment and after an internal revenue agent proposed a deficiency. The record indicates no formal request by the Collector for payment of a stated amount plus interest, as there was here. Moreover, the court found that the remittance was intended "to forestall the accrual of interest on any deficiency" and was "merely an advance deposit" and not for the satisfaction of a tax liability (*id.* at 943, 944). Here, on the other hand, one of the taxpayers testified that he knew exactly how much the government was claiming, that the liability had been defined (Supp. 1b–3b) and that he figured the date upon which the refund should be filed from the date upon which he incorrectly believed the Collector had received the check; not the date of assessment (R. 10a).

The difference in the results reached by the two courts below and in *Rosenman* and *Mercantile Nat. Bank* stems not from a conflict in the interpretation of the statute but from these differences in the facts presented. This is a matter appropriately left to the judgment of the trial court and, following review and affirmance by the court of appeals, clearly does not warrant further review by this Court.

2. Taxpayers' alternative contention that their reliance on the April 10, 1946, date stamped on the receipt for payment estops the government from asserting that payment occurred on April 1 presents no general question warranting review by this Court. It turns wholly on the facts of this case, and in any event, is without merit.

Estoppel is not ordinarly applied against the United States (*Wilber Nat. Bank* v. *United States*, 294 U.S. 120, 123; *Goldstein* v. *United States*, 227 F. 2d 1, 4 (C.A. 8); *Walker-Hill Co.* v. *United States*, 162 F. 2d 259, 263 (C.A. 7), certiorari denied, 332 U.S. 771), and the facts of this case present no occasion for an exception to that rule. At most the receipt was ambiguous since, in addition to the April 10 date, it showed that the payment was received on April 1 (R. 17a; see Statement, *supra*). The pertinent Treasury Regulations, Section 81.77, *supra*, advise that the date the check is received by the Collector is the date of payment and since taxpayers mailed the check in Philadelphia on March 28, 1946, they should have expected the Collector to receive the check on April 1, not April 10. Further, the taxpayers had ample opportunity after receiving the receipt to resolve the ambiguity in the two dates and by their failure to do so are properly chargeable with any prejudice which resulted from it. A party knowing the facts or in a position to know them cannot claim the benefit of estoppel. *Hull* v. *Commissioner*, 87 F. 2d 260, 262 (C.A. 4).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1962.

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